ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-827

	Opinion Delivered JANUARY 28, 2009
RAY GARCIA APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT,
V.	[NO. J2006-1214]
	HONORABLE JAY T. FINCH, JUDGE
ARKANSAS DEP'T OF HUMAN SERVICES and H.G., MINOR CHILD APPELLEES	AFFIRMED; MOTION TO WITHDRAW GRANTED

ROBERT J. GLADWIN, Judge

This is a no-merit appeal from the termination of Ray Garcia's parental rights to his minor child. Pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores I*), and Arkansas Supreme Court Rule 4-3(j)(1), Garcia's attorney has filed a motion to withdraw. He has also submitted a brief discussing the sufficiency of the evidence supporting the termination, and correctly asserts that there were no other adverse rulings made at the termination hearing. As Garcia's counsel complied with the rules governing no-merit briefs, and as clear and convincing evidence supports the termination decision, we grant counsel's motion to be relieved and affirm the termination order.

I. Facts

Garcia is the father of H.G., and Natashia Hosier is the mother. Both Garcia and Hosier lived in California when H.G. was born, and they exercised joint custody. Hosier subsequently returned to Arkansas. This case began because Hosier essentially abandoned H.G. to the care of Hosier's great aunt and great uncle, Krista and Matt Wright.[1]

Hosier and H.G. came into the Wrights' home in April 2006, but Hosier returned H.G. to Garcia's custody from July to September 2006. H.G. and her parents returned to Arkansas in October and stayed with the Wrights. After Garcia and Hosier argued, the Wrights made Hosier leave their home. Garcia stayed at their home for approximately one month and then returned to California.

The Wrights agreed to keep H.G. while Hosier was working during the week. Garcia returned to Arkansas over the 2006 Thanksgiving holiday to pick up H.G. When Hosier discovered that Garcia was coming to pick up H.G., she picked up her child from the Wrights. The Wrights were worried due to Hosier's drug problems and the fact that she had no fixed abode. Three days after Hosier took H.G., Hosier's sister telephoned the Wrights and told them that Hosier left H.G. with her and had not returned. The Wrights then picked up H.G.

On November 29, 2006, the Wrights received a phone call from the man with whom Hosier was living. He informed them that he was trying to help Hosier become sober, but

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[1]Hosier's parental rights to H.G. were also terminated, but her rights are not the subject of this appeal.

that she was so high she did not know where she was. The man said that he was worried about H.G. because Hosier was planning to pick up the child. The Wrights then informed the Arkansas Department of Human Services (DHS) that Hosier had left H.G. in their care and that she only periodically called or visited H.G. The Wrights were concerned that Hosier would remove H.G. and place the child in an unsafe situation.

DHS took emergency custody of H.G. on November 29, 2006, and the emergency custody was thereafter continued by an order entered on December 4, 2006. The probable cause hearing was held on December 5, 2006, and probable cause was found to continue custody in DHS. H.G. was returned to the Wrights' custody as foster parents in mid-December 2008. Garcia was permitted to have scheduled supervised visitation with H.G. at DHS offices.

H.G. was subsequently adjudicated as dependent-neglected based on Hosier's stipulations that, due to her drug addiction, she failed to take reasonable action to protect H.G. from neglect or parental unfitness; that she failed to provide for H.G.'s physical, mental, and emotional needs, including safe shelter; that Hosier failed to provide for H.G.'s care and maintenance, including medical care; and that Hosier failed to appropriately supervise H.G., resulting in the child being left alone at an inappropriate age or inappropriate circumstances, creating a dangerous situation or a situation that put H.G. at risk of harm.

The trial court made no findings regarding Garcia but noted that he resided in California. The trial court again awarded supervised visitation at DHS offices. Garcia was ordered to comply with the visitation schedule. He was further ordered to 1) obtain and

maintain an infant/child CPR certification and to provide to DHS documentation of the same; 2) obtain and maintain safe, stable, and appropriate housing; 3) remain drug-free and keep his home drug-free; 4) obtain and maintain stable, full-time employment and provide documentation of the same to DHS; 5) pay ten dollars per week in child support;[2] 6) comply with the procedures and processes of the Interstate Compact for the Placement of Children (ICPC);[3] and 7) cooperate with DHS regarding all case-plan goals, referrals, and services.

The first review hearing was held on April 17, 2007. Garcia did not appear for this hearing.[4] The trial court found that Garcia had obtained and maintained housing and

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[2]The adjudication order contains an error, stating that Garcia shall pay "a minimum of thirty dollars ($10.00) per week in child support." *See* Add. at 74. The court apparently meant to order Garcia to pay ten dollars per week in child support. The July 6, 2007 review order correctly indicates that Garcia shall pay "a minimum of ten dollars ($10.00) per week in child support." *See* Add. at 100.

[3]The ICPC is found at Ark. Code Ann. § 9-29-201 - § 9-29-208 (Repl. 2008). The purpose of the compact is to ensure the appropriate placement of children when the child could be placed in more than one State. *See* Ark. Code Ann. § 9-29-201.

Because a California court previously entered a custody order concerning H.G., the Arkansas court had the parties submit a brief on the application of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), found at Ark. Code Ann. § 9-19-101 et seq. Neither the record nor appellant's addendum contain any orders by the court concerning compliance with the UCCJEA, but it is apparent that the circuit court exercised jurisdiction under the Act, that Garcia had sufficient notice of the proceedings in this case, and that both parents submitted to the jurisdiction of the court by appearing in person.

[4]The trial court previously found Garcia to be indigent. It appears that Garcia was not appointed counsel until the November 2007 permanency planning hearing. However, any error based on the failure to initially appoint counsel would be harmless, as Garcia was represented at the termination hearing, and as the evidence concerning the reasons for removal and the basis for the dependency-neglect adjudication were also presented at the termination hearing. *See Briscoe v. State*, 323 Ark. 4, 912 S.W.2d 425

employment but that he failed to exercise visitation on a regular basis, although he did have "some" telephone visitations with H.G. As both Garcia and Hosier lived outside of Arkansas at the time, the court authorized telephone visitation. The trial court further found that Garcia failed to contact DHS during the previous review period. The trial court's previous orders remained in effect.

The next review hearing was held on August 21, 2007, and Garcia appeared. The trial court found that Garcia had maintained housing but had not maintained stable employment, had not fully complied with visitation, and had not completed the CPR certification. The trial court continued its previous orders and again ordered Garcia to pay child support. On December 7, 2007, based on Garcia's affidavit of financial means, the trial court entered a supplemental order of child support, increasing Garcia's child-support obligation to sixty-two dollars per week.

The permanency-planning hearing was held on November 27, 2007, during which the trial court changed the case goal to termination and adoption. The trial court found that Garcia had complied with the case plan only in that he had obtained housing. It found that Garcia failed to maintain stable employment, to obtain transportation, to pay child support, and to complete CPR certification. The trial court further found that Garcia failed to obtain a driver's license and failed to pay off his DUI fine. The trial court's prior orders continued.

(1996).

DHS filed a petition to terminate Garcia's parental rights on December 20, 2007. It alleged that the only portion of the case plan with which Garcia complied was that he obtained housing. The termination hearing was held on March 27, 2008.

Matt Wright, Hosier's great-uncle by marriage, testified that H.G. had lived with him and Hosier's great-aunt since mid-December 2006, and that Garcia had not provided any financial support for H.G. during that time. Additionally, Mr. Wright said that telephone visitation was set up for Sunday, Tuesday, and Thursday, between 6:00 p.m. and 8:00 p.m, but that Garcia did not regularly call H.G. For example, after the November permanency-planning hearing, Garcia called regularly for approximately one-and-a-half months. But then he failed to call for the next three weeks. Since that time, Mr. Wright said that Garcia's calls were "hit-and-miss," that Garcia sometimes called too late or too early, and that he called twice the week before the termination hearing. According to Mr. Wright, Garcia had the Wrights' cell phone numbers.

DHS's family-service worker from the inception of the case, Laura Kiehlbach, also testified. She recommended terminating Garcia's parental rights. She stated that H.G. was nearly three-and-a-half years old, that she had been out of her parents' care since November 29, 2006, and that Garcia had seen H.G. only a few times in that sixteen-month period.

Kiehlbach testified that the ICPC report was initiated in April 2006 but was not completed until August because Garcia did not cooperate with the fingerprinting requirement and the background check. She also explained that the home study that had been performed was no longer valid, as Garcia recently moved into his girlfriend's home; thus, a new home

study would be required for Garcia's new residence, and a background check needed to be performed on Garcia's girlfriend.

As to Garcia's employment, Kiehlbach stated that Garcia was unemployed from at least March 2007 through November 2007. He had reported that he was working at a temporary job at a warehouse, but he had not provided DHS proof of his current job. The last documentation that Kiehlbach had was proof of Garcia's unemployment benefits. Kiehlbach did not know the exact date that Garcia started his temporary job, but she believed it would have been after the November 2007 permanency-planning hearing.

Additionally, Kiehlbach testified that Garcia had not paid any child support and had not consistently exercised telephone visitation. She said that Garcia claimed to have completed CPR classes but that he provided no documentation that he had done so. Kiehlbach conceded that Garcia had maintained housing since the start of the case. Nonetheless, she was concerned about placing H.G. with Garcia because she said that his "lifestyle is not such that it shows a lot of responsibility." In particular, she noted his failure to maintain steady employment, the fact that he lost his driver's license due to a 2004 DUI, that he had yet to regain his license, and the fact that he still owed the majority of his DUI fine.

As to the adoptability of H.G., Kiehlbach stated that she was not aware of any developmental or behavioral issues that would prevent H.G. from being adopted. She identified several families that were interested in adopting H.G., including H.G.'s grandparents.

H.G.'s attorney ad litem also recommended termination, stating that, "Neither parent has really stepped forward and shown an interest in being a parent." The court agreed, stating:

> With regard to the father, Mr. Garcia shows in the couple of times that he's been here, I recall specifically addressing him directly telling him that he needed to participate in the case as this Court had set it up. Not just participate the way he thought he ought to. Which seemed to be that he would go to California and find somebody who could take the child into their home, most notably, his mother.
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> An ICPC was done on [Garcia's] mother's home and it was found to be appropriate. However, Mr. Garcia would not participate in getting the things done in order to get the child moved into that home, and now apparently has left that home, established another home and is living with someone who is unknown to the Court, who has not had the background checks, and that would only further delay the child's placement in a permanent home, far beyond the extended period of time that has already occurred.
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> So, I'm going to find that it's . . . in [H.G.'s] best interest to terminate the parental rights of Raymond Garcia.

The court subsequently entered a written order terminating Garcia's parental rights to H.G., and this no-merit appeal followed.

II. Termination

As this is a no-merit appeal, counsel was required to address each of the adverse rulings rendered during the termination hearing and explain why none presents a non-frivolous basis for an appeal. *See Linker-Flores I*, *supra*. The only adverse ruling that occurred during the termination hearing was the ultimate decision to terminate Garcia's parental rights. Counsel adequately explains that any appeal based on the sufficiency of the evidence supporting the termination order would be wholly without merit. Accordingly, this court affirms the termination order and grants counsel's motion to be relieved.

An order terminating parental rights must be based on clear and convincing evidence. *See Lewis v. Arkansas Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Id.* When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the circuit court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.* Such cases are reviewed de novo on appeal. *Id.* However, we give a high degree of deference to the circuit court, as it is in a far superior position to observe the parties before it and to judge the credibility of the witnesses. *Id.*

Arkansas Code Annotated section 9-27-341(b)(3) (Repl. 2008) states that an order terminating parental rights shall be based upon a finding by clear and convincing evidence (1) that termination is in the best interest of the juvenile after considering the likelihood of adoption and the potential harm, specifically addressing the effect on the health and safety of the child caused by continuing contact with the parent, and (2) that termination is founded based on one or more of the grounds for termination listed in section 9-27-341(b)(3)(B).

Here, the circuit court considered the likelihood that H.G. would be adopted, as required by Arkansas Code Annotated section 9-27-341(b)(3)(A)(i). In its written order, the trial court found that DHS had identified a potential adoptive placement for H.G. This

finding is supported by Kiehlbach's testimony that no developmental or behavioral issues would prevent H.G. from being adopted and that several families were interested in adopting H.G., including her grandparents.

Next, addressing the potential harm in returning H.G. to Garcia's custody, the trial court cited the length of time that H.G. had been out of the home (sixteen months).[5] It found that Garcia failed to comply with the case-plan goals, failed to provide any support for H.G., and that he failed to make substantial progress regarding the case-plan goals and court orders.

The trial court then cited three additional statutory grounds supporting termination. First, pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(B)(i)(a), it found that H.G. had been out of the home for at least twelve months, and that, despite DHS's meaningful effort to rehabilitate Garcia and to correct the conditions that caused removal, Garcia failed to remedy those conditions. Second, pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(B)(ii)(a), the trial court found that Garcia willfully failed to provide significant material support with his means or to make meaningful contact with H.G. It more specifically found that Garcia failed to provide any support for H.G. and that, although he contacted her by phone, he "failed to establish a parent-child relationship."

Finally, pursuant to Arkansas Code Annotated section 9-27-341(b)(3)(B)(ix)(a)(3)(B)(i), the trial court determined that Garcia subjected H.G. to aggravating circumstances, in that he

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[5]The termination order erroneously states that H.G. had been out of the home for fourteen months.

failed to actively participate in her life, failed to support her, and failed to make any significant progress toward reunification, resulting in little likelihood that continued services would result in successful reunification.

In short, the same clear and convincing evidence supporting these three additional statutory bases for termination also support the trial court's potential-harm finding. When the termination hearing was held, H.G. was approximately three-and-a-half-years old. H.G. had been out of Garcia's custody for sixteen months, since she was barely two-years old. Thus, the child had been out of Garcia's custody for a significant portion of her young life, and clearly, had been out of the home for at least twelve months.

As to meaningful efforts, Garcia did not appeal from any of the prior orders in which the circuit court determined that DHS had provided reasonable services directed toward reunification. Thus, Garcia would now be precluded from claiming that DHS failed to make meaningful efforts to rehabilitate him and to correct the conditions causing removal. *See* Ark. R. App. P. – Civil 2(c)(3); *Lewis*, *supra*.

Such an argument would also be wholly frivolous on the merits. DHS provided family foster care and the necessary home study for Garcia's mother's residence, as well as the requisite background checks for members of Garcia's mother's residence. It also complied with the ICPC, offered telephone visitation, and offered Garcia transportation assistance within the State of Arkansas. In short, DHS offered Garcia the services that he needed in order to regain custody of his child.

Yet, as the circuit court found, despite DHS's offer of reunification services, Garcia simply failed to make any significant effort toward regaining custody of his child. As the attorney ad litem stated, Garcia did not step forward and show an interest in being a parent. Paraphrasing the family-service worker, Garcia does not engage in the type of responsible behavior that would warrant returning H.G. to his custody.

Garcia failed to maintain consistent contact with his child in such a manner as to establish a father-child relationship. He saw his child in person only a few times in the sixteen-month pendency of this case. Even if that sparse contact is excusable because Garcia lived in California, he did not manage to maintain regular telephone contact as ordered. Except for a temporary spurt of regular contact after the case goal was changed to termination, Garcia's telephone contact with H.G. was "hit and miss" despite the fact that he had the Wrights' cell phone numbers. Finally, he failed to appear, even by telephone, for the termination hearing.

Further, Garcia failed to maintain steady employment. He was unemployed for a substantial part of 2007 and did not obtain employment until after the case goal was changed to termination. Garcia failed to provide documentation of his current employment, which was only temporary employment.

Garcia also failed to provide for H.G.'s material support. The record supports that he provided absolutely no financial support for his child during the pendency of this case, even when he was employed. Yet, he was initially ordered to pay only ten dollars per month in

child support, and no evidence was presented to suggest that he was unable to pay child support as ordered.

In addition, Garcia failed to regain his driver's license, to obtain reliable transportation, and failed to pay his DUI fines (possibly subjecting him to future incarceration). He also claimed to have completed CPR classes but failed to provide documentation of the same.

The only provision of the case plan with which Garcia consistently complied was that he maintained stable housing. Yet, he did not do that in a manner that would permit returning H.G. to his custody. For most of the case, he lived with his mother, whose home was approved, but only after considerable delay, which was due to Garcia's failure to cooperate with the fingerprint requirement and the background check. After finally getting his mother's home approved, Garcia moved in with his girlfriend a few months before the termination hearing. Thus, as of the date of the termination hearing, a new home study and a background check on his girlfriend was required, which would only further delay the possibility of reunification. Hence, Garcia failed to establish that he could provide secure, stable housing for his child, independently, or even with assistance.

It is true that it was Hosier's conduct, not Garcia's, that initially caused H.G. to be placed in DHS's custody. However, it is significant that H.G. could not immediately be placed with Garcia. Moreover, at no time during the pendency of this case did Garcia conduct himself in a manner that would permit H.G. to be returned to his custody or that would permit unsupervised or extended visitation. A parent's resumption of contact or overtures toward participating in the case plan or obeying court orders following the

permanency-planning hearing will not preclude termination. *See* Ark. Code Ann. § 9-27-341(a)(4)(A). Moreover, partial compliance with the case plan does not preclude termination. What matters is whether a parent's compliance with the case plan achieved the intended result of making him capable of caring for his child. *See Ullom v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000).

On these facts, an appeal from the termination decision based on the sufficiency of the evidence would be wholly without merit. Accordingly, counsel's motion to be relieved is granted and the termination order is affirmed.

Affirmed and motion to withdraw granted.

HENRY and BAKER, JJ., agree.